BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC., Petitioner,	)	No. PCB 03-104
vs.	)	(Pollution Control Facility Siting Application)
COUNTY BOARD OF KANE COUNTY, ILLINOIS, Respondent.	)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on April 30, 2003, we filed with the Illinois Pollution Control Board, the attached Waste Management of Illinois, Inc.'s **MEMORANDUM IN SUPPORT OF THE SITING APPEAL OF WASTE MANAGEMENT OF ILLINOIS, INC. TO CONTEST SITE LOCATION DENIAL** in the above entitled matter.

WASTE MANAGEMENT OF ILLINOIS, INC.

By: _____
One of Its Attorneys

Donald J. Moran
PEDERSEN & HOUPT
161 North Clark Street, Suite 3100
Chicago, Illinois 60601
(312) 641-6888
Attorney Registration No. 1953923

-496

PROOF OF SERVICE

Victoria L. Kennedy, a non-attorney, on oath states that she served the foregoing Waste Management of Illinois, Inc.'s **MEMORANDUM IN SUPPORT OF THE SITING APPEAL OF WASTE MANAGEMENT OF ILLINOIS, INC. TO CONTEST SITE LOCATION DENIAL** by hand delivery to the parties listed below on or before 5:00 p.m. on this 30th day of April, 2003:

Ms. Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 W. Randolph St., Suite 11-500
Chicago, IL 60601

Jennifer J. Sackett Pohlenz
Querrey & Harrow, Ltd.
175 W. Jackson, Suite 1600
Chicago, IL 60604

Derke J. Price
Ancel, Glink, Diamond, Bush, DiCianni & Rolek, P.C.
140 South Dearborn Street, Sixth Floor
Chicago, IL 60603

Mr. Brad Halloran
Assistant Attorney General
Environmental Division
100 West Randolph, 11th Floor
Chicago, Illinois 60601

Victoria L. Kennedy

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Petitioner,	)	No. PCB 03-104
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	)	(Pollution Control Facility
vs.	)	Siting Appeal)
	)	
COUNTY BOARD OF KANE COUNTY, ILLINOIS,	)	
	)	
Respondent.	)	

MEMORANDUM IN SUPPORT OF THE SITING APPEAL OF WASTE MANAGEMENT OF ILLINOIS, INC. TO CONTEST SITE LOCATION DENIAL

PEDERSEN & HOUPT
By: Donald J. Moran

Attorney for Waste Management of Illinois, Inc.
161 North Clark Street
Suite 3100
Chicago, Illinois 60601

312-641-6888
312-641-6895 (Fax)

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MEMORANDUM IN SUPPORT OF THE SITING APPEAL OF
WASTE MANAGEMENT OF ILLINOIS, INC.
TO CONTEST SITE LOCATION DENIAL

I. INTRODUCTION

Waste Management of Illinois, Inc. ("WMII") appeals the denial of its Site Location Application ("Application") for the Woodland Transfer Facility ("Facility") by the County Board of Kane County ("County Board") pursuant to Section 40.1(a) of the Illinois Environmental Protection Act ("Act"). 415 ILCS 5/40.1(a)(2002). While the County Board adopted certain findings of the Hearing Officer that the statutory criteria were met, it did not adopt his findings that criterion 2, 3, 6 and 8 were met. Instead, the County Board referred to a memorandum prepared by County Board member Mr. Dan Walter ("Walter Memorandum") that argued criteria 2, 3, 6 and 8 were not met.

The County Board's decision denying local siting approval was not based solely on the evidence presented in the siting process, but on the Walter Memorandum, a legally and factually inaccurate advocacy document to which WMII had no opportunity to respond. The County Board's reliance on the Walter Memorandum made the process legislative, not adjudicative. Thus, the County Board's December 10, 2002 decision as enacted in Resolution 02-431 ("Resolution") was the result of a fundamentally unfair procedure. In addition, the County Board's failure to find that criteria 2, 3, 6 and 8 were met is against the manifest weight of the evidence.

A. Application for Woodland Transfer Facility

On June 14, 2002, WMII submitted its Application with Kane County, Illinois requesting site location approval for the Woodland Transfer Facility ("Facility"). (Application at Additional Information – Tab "A.") The Application was prepared and submitted pursuant to the requirements of Section 39.2 of the Act.

WMII proposed to site, permit, construct and operate a new transfer facility on the southeastern portion of the existing Woodland Landfill property located in unincorporated Kane County, Illinois. The Facility is located approximately 1,500 feet west/southwest of the Intersection of Illinois Route 25 ("Rt. 25") and Dunham Road, and is approximately 9 acres in size. (Application at Executive Summary, p. ES-1.)

The Facility will be used for the consolidation and transfer of municipal solid waste, landscape waste and general construction and demolition debris from residential, commercial and industrial waste generators. It would process an average of 2,000 tons per day (tpd) of waste materials, with a maximum processing capability of 2,640 tpd. (Application at Executive Summary, p. ES-1.)

Notice was served and published within the prescribed time period in accordance with the requirements of Section 39.2(b) of the Act. (Application at Additional Information - Tab "A.") The Application contained sufficient information to demonstrate compliance with Section 39.2(a) of the Act and the Kane County Rules of Procedure for New Regional Pollution Control Facility Site Approval Applications in Unincorporated Areas of Kane County ("Ordinance"). (Application at ORD-1.)

B. Public Hearings

The public hearing on the Application was held September 17 through October 10, 2002. The Hearing Officer conducted a public informational meeting on September 12, 2002, for the specific purpose of answering any questions that citizens might have concerning the siting process. (9/12/02 Tr. at 3.)

WMII presented six witnesses at the public hearing who testified in support of the Application and the statutory criteria. Ms. Sheryl Smith testified that the Facility was necessary and was consistent with the Kane County solid waste management plan. Mr. Andrew Nickodem testified that criteria 2, 4, 7, and 9 were met. Mr. J. Christopher Lannert testified that the Facility was compatible with the character of the surrounding area. Ms. Patricia Beaver-McGarr testified that the Facility was located so as to minimize any effect on the value of surrounding property. Mr. Dale Hoekstra testified that criteria 2 and 5 were met. Mr. David Miller testified that the traffic patterns to and from the Facility minimized impact on existing traffic flows.

Members of the general public were permitted at the public hearings to present evidence and witnesses, to make statements, and to ask questions by completing the "Submittal of Written Questions to be Asked of a Witness" form as provided by the Hearing Officer, submitting them to the Hearing Officer, and then having the questions asked of the witnesses by the Hearing

Officer. Members of the general public were also permitted to make an oral statement at the end of the public hearing. (9/12/02 Tr. at 30.)

Mr. Joseph Cluchey testified on behalf of the South Elgin Countryside Fire Protection District and presented testimony regarding Criteria 5 and 6. His testimony neither supported nor opposed the Application. (10/3/02 Tr. at 127.) Mr. Daniel Lynch testified on behalf of the Village of Wayne and presented testimony regarding criterion 6. He testified against the Application. (10/9/02 Tr. at 9.) Eight members of the general public made oral statements and/or submitted various documents that were admitted into the record. (10/10/02 Tr. at 142-192.)

Kane County retained legal counsel, Ms. Jennifer Sackett Pohlenz, as well as technical consultants from Deigan & Associates, LLC and CEMCON, Limited/Coulter Transportation Consulting, LLC, to perform reviews of the Application. (10/9/02 Tr. at 24; 10/10/02 Tr. at 5.) Mr. Gary Deigan and Mr. Brent Coulter testified on the Application regarding criteria 2 and 5, and criterion 6, respectively. They did not testify in opposition to the Application. (10/9/02 Tr. at 24; 10/10/02 Tr. at 5.) No written reports were submitted to the Kane County Clerk for inclusion in the record other than the Application. (9/17/02 Tr. at 11; Petitioner's Exhibit 1.)

II. ARGUMENT

WMII contests the County Board's decision to deny the Application because the procedure used by the County Board in reaching that decision was fundamentally unfair. WMII further contests the County Board's siting denial because it is wholly unsupported by the record and is against the manifest weight of the evidence.

The Hearing Officer found that all of the criteria were met as stated in his "Findings of the Hearing Officer" ("Findings") and recommended that the County Board grant local siting

approval subject to certain conditions. The County Board Chairman accepted all of the Findings. However, the County Board, while it accepted and adopted all of the Findings and included them as Exhibit "A" to its Resolution, stated that it did not accept the Findings to the extent that they were inconsistent with the Walter Memorandum. However, the County Board did not accept or adopt the Walter Memorandum or determine that any criteria were not met. The County Board merely referred to the Walter Memorandum as the basis for its refusal to accept all of the Findings and find that criteria 2, 3, 6 and 8 were met.

The Walter Memorandum offered what Walter claimed to be a summary of evidence presented at the hearings and an analysis of the governing legal standards. In fact, it contained erroneous legal argument and misstatements of fact that were not presented or subject to cross-examination at the hearing. Its conclusion was that "the applicant has failed to establish that it has met the required standards of Criteria 2, 3, 6 and 8 as well as local Ordinances. Therefore, the application is defective and the petition *must be denied.*" (Walter Memorandum, p. 4.)

The Walter Memorandum was distributed to County Board members on December 10, 2002, the same day they voted on the Application. (Respondent's Responses to Petitioner's Requests to Admit, p. 2.) WMII had no opportunity to respond to its factual and legal inaccuracies, or to correct the erroneous summary of evidence. WMII was unable to respond to the legal argument, which misstated the governing law. The result is a decision based on matters outside the record, erroneous facts, and application of incorrect legal standards.

In addition to, and indeed because of, the improper and unfair reliance of the County Board on the Walter Memorandum, the County Board decision is unsupported and against the manifest weight of the evidence.

A. The County Board Denial Was a Legislative, Not an Adjudicative, Decision

Siting proceedings under the Act are adjudicatory. Land and Lakes Co. v. Pollution Control Board, 245 Ill.App.3d 631, 616 N.E.2d 349, 354 (3d Dist. 1993). Decisions on a siting application are to be based strictly on the evidence presented in the record, and the facts relied upon are to be developed by the parties. E & E Hauling, Inc. v. Pollution Control Board, 116 Ill.App.3d 586, 451 N.E.2d 555, 566 (2d Dist. 1983) aff'd 107 Ill. 2d 33, 481 N.E.2d 664 (July 17, 1985). The purpose of the statutory criteria is to establish the standards by which the siting request is to be evaluated, so that the siting decision is based on the relevant facts presented during the siting process, and not arbitrarily or by extra-record considerations. Clutts v. Beasley, 185 Ill.App.3d 543, 541 N.E.2d 844, 845 (5th Dist. 1989).

Siting proceedings are not the legal equivalent of zoning hearings, which have traditionally been viewed as legislative in nature. In a zoning hearing, a local government crafts rules of general application based upon facts and considerations that may not have been presented at hearing, but are made known to the decision-maker outside the hearing process. These legislative considerations are proper input in a legislative process that results in a policy decision. People ex rel. Klaeren v. Village of Lisle, 202 Ill.2d 164, 781 N.E.2d 223, 228-29 (2002).

However, such legislative or extra-judicial considerations are inappropriate where, as in a siting proceeding, the local government acts in a fact-finding capacity to decide disputed facts based upon evidence adduced at hearing. Village of Lisle, 781 N.E.2d at 234; Land and Lakes Co., 616 N.E.2d at 357. Facts that are not presented in the record, especially incorrect or misstated facts, are not properly considered by a local government in reviewing and deciding a siting request. American Bottom Conservancy v. Village of Fairmont City, No. PCB 01-159,

slip op. at 9 (October 18, 2001); see also Southwest Energy Corp. v. Pollution Control Board, 275 Ill.App.3d 84, 91, 655 N.E.2d 304 (4th Dist. 1995) (local government cannot exercise its legislative-type discretion in deciding siting request). Facts or information presented outside the record, to which a siting applicant is given no opportunity to respond, is a violation of fundamental fairness. Southwest Energy Corp., 275 Ill.App.3d at 93-94; City of Rockford v. Winnebago County, No. PCB 87-92, slip op. at 9 (November 19, 1987).

In addition, a local government may not base its decision on factually incorrect findings or erroneous data or conclusions. Land and Lakes Co., 616 N.E.2d at 357. Where a local government relies upon inaccurate facts or erroneous conclusions in denying a siting request, the applicant's right to a fundamentally fair hearing has been violated. Land and Lakes Co., 616 N.E.2d at 357; City of Rockford, slip op. at 9. A local government must confine itself to the record, and may not consider supplemental, incorrect or erroneous information, particularly when the siting applicant has had no opportunity to respond. Land and Lakes Co. v. Illinois Pollution Control Board, 319 Ill.App.3d 41, 743 N.E.2d 188, 196 (3d Dist. 2000); Southwest Energy Corp., 275 Ill.App.3d at 93-94; Land and Lakes Co., 616 N.E.2d at 357; City of Rockford, slip op. at 9.

The denial of the Application was based upon the exercise of legislative discretion by the County Board. The exercise of that discretion was based upon the Walter Memorandum, a document that both misapplied the law and misstated the facts. As WMII was given no opportunity to respond to the Walter Memorandum, the County Board decision was based upon legal and factual errors. These errors prevented the County Board from rendering an adjudicative decision, and this violated WMII's right to a fundamentally fair decision making process.

1. The Walter Memorandum Misstated The Law

The Walter Memorandum misstated the law concerning criteria 2, 3, 6 and 8 and, as such, misapplied the standards to be applied in determining whether the statutory criteria were met.

(a) The Walter Memorandum Applied the Wrong Standard for Criterion 2

Criterion 2 requires an applicant to show that "the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected." (415 ILCS 5/39.2(a)(ii)). This criterion requires a demonstration that the design or operation of the proposed facility does not pose an unacceptable risk to the public health and safety. Industrial Fuels & Resources v. Pollution Control Board, 227 Ill.App.3d 533, 592 N.E.2d 148, 157 (1st Dist. 1992). It does not, however, require a guarantee against any risk or problem. Residents Against Polluted Environment v. Pollution Control Board, 293 Ill.App.3d. 219, 687 N.E.2d 552 (3d Dist. 1997); File v. D&L Landfill, 219 Ill.App.3d 897, 579 N.E.2d 1228 (5th Dist. 1991).

Rather than explain how the design or operation of the Facility would pose an unacceptable public health risk, the Walter Memorandum argued that criterion 2 was not met because WMII failed to identify certain schools in the area pursuant to the Ordinance and failed to consider the end use plan associated with the 1988 Siting Approval for the Woodland III Landfill Expansion ("1988 Siting Approval") in evaluating traffic flows in and out of the Facility. Hence, according to the Walter Memorandum, the Facility would not protect the public health and safety, and would "directly conflict with the planned/promised use as a park" and not satisfy criterion 2. (Walter Memorandum, pp. 3, 4.)

These statements in the Walter Memorandum are simply not true (See infra pp. 17-21, 27, 31). Even if they were, they are not relevant in evaluating whether criterion 2 has been met.

The transportation routes of students attending schools located approximately 1½ miles away and the effect of Facility traffic on the 1988 proposed end use plan[1] for the closed Woodland Landfill are not proper standards in determining whether the Facility's design and operation present significant public health or safety risks.

(b) The Walter Memorandum Applied the Wrong Standard for Criterion 3

The Walter Memorandum concluded that criterion 3 was not met for two reasons: the Facility was not compatible with the surrounding area, and WMII failed to meet the requirement of Section 28(a)(4) of the Ordinance. (Walter Memorandum, p. 4.) These conclusions are not proper considerations under the Act, which states that an applicant must demonstrate that "the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property." (415 ILCS 5/39.2(a)(iii)).

First, the Walter Memorandum argued that the planned use of the closed Woodland Landfill (as a park or for passive recreation) and the surrounding area would be "forcibly altered" by the development of the Facility. (Walter Memorandum, p. 4.) According to the Walter Memorandum, anything short of the proposed end use as a park or a passive recreation area makes the entire parcel incompatible. (Walter Memorandum, pp. 3, 4.) As a result of this incompatibility, the Walter Memorandum concluded that criterion 3 was not met. The Act,

[1] It must be emphasized that the end use plan described in the 1988 Siting Application for the Expansion of the Woodland Landfill was a proposed conceptual plan. It was not, and has not been, approved by Kane County, any local government units or the Illinois Environment Protection Agency. (9/17/02 Tr. at 135, 136.) A final detailed plan will not be implemented until it has been approved by all governing local government and state agencies.

however, does not require a compatible use; it requires a showing that any incompatibility be minimized.[2]

The Walter Memorandum further argued that the traffic "traveling in and out of the proposed facility" made the Facility incompatible with the proposed end use, and thus failed to satisfy Criterion 3. (Walter Memorandum, p. 4.) Specifically, the Walter Memorandum stated that WMII proposed to use the Facility entrance for vehicles "traveling in and out..." of the Facility and that this directly conflicts with the proposed end use for the Woodland Landfill. (Walter Memorandum, p. 4.) Traffic in and out of the Facility does not relate to the question of minimizing incompatibility with the character of the surrounding area.

Moreover, the Walter Memorandum attempted to tie its conclusion as to why criterion 3 was not met to a failure of WMII to meet criterion 2. It argued that if criterion 2 was not met, then criterion 3 could not be met. However, the traffic movements within the Facility do not relate to design or operational risks to the public health, safety and welfare. Therefore, these traffic issues are not properly considered in determining whether criterion 2 or criterion 3 have been met.

Second, the Walter Memorandum concluded that criterion 3 was not met because WMII failed to meet the 5-mile radius land use description requirement of Section 28(a)(4) of the Ordinance. Specifically, the Walter Memorandum concluded, "(a)ny conclusions without this evidence are significantly flawed." (Walter Memorandum, p. 4.) Criterion 3 does not require a description of land uses within a five-mile radius of the proposed facility. Criterion 3 speaks in terms of "the character of the surrounding area." (415 ILCS 5/39.2(a)(iii)) "Surrounding,"

[2] In fact, as will be further explained below (See infra pp. 28-38), the only testimony presented in this record is that the Facility is compatible with the character of the surrounding area. (9/17/02 Tr. at 56.)

means "that which encircles on all or nearly all sides." (Webster's New World Dictionary, 3rd 1991.) "Surrounding" does not include any area extending out five miles from the Facility.

In addition, and putting aside for the moment the issue of whether there is any logical reason or purpose in describing all zoning and land uses within five miles of the Facility, strict compliance with a local siting ordinance is an issue of fundamental fairness, not of whether criterion 3 has been satisfied. Daly v. Village of Robbins, Nos. PCB 93-52, 93-54, slip op. at 6 (July 1, 1993). The fact that WMII did not strictly comply with Section 28(a)(4) of the Ordinance does not establish a failure to satisfy criterion 3. To state or imply otherwise is to misstate the siting law.

(c) The Walter Memorandum Applied the Wrong Standard for Criterion 6

The Walter Memorandum concluded that "(a)ll existing routes have been shown to be inadequate by expert testimony," and therefore criterion 6 was not met. (Walter Memorandum, p. 2.) This is inconsistent with the requirements of the Act, which states that an applicant must demonstrate that "the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows." (415 ILCS 5/39.2(a)(vi)). Contrary to the conclusion of the Walter Memorandum, the Act does not involve a determination of whether there are any acceptable traffic routes, or whether impacts have been eliminated. Although the Walter Memorandum correctly stated, "Criteria (sic) 6 required the applicant to prove that they had minimized impact of existing traffic flows," it incorrectly applied the Act in evaluating the Application and improperly concluded that all routes were found to be inadequate. (Walter Memorandum, pp. 1, 2 and 4.)

(d) The Walter Memorandum Applied the Wrong Standard for Criterion 8

The Walter Memorandum contended that criterion 8 was not met due to failure of WMII to meet one requirement identified in the Kane County Solid Waste Management Plan. That requirement was that WMII develop traffic characteristics of future growth. (Walter Memorandum, p. 3.)

Criterion 8 involves review of the solid waste plan language to determine whether the proposed facility is consistent with the plan. Land and Lakes Company v. Randolph County, No. PCB 99-59, slip op. at 31-32 (P.C.B. September 21, 2000). Strict compliance with the solid waste plan is not required. City of Geneva v. Waste Management of Illinois, Inc., No. PCB 94-58, slip op. at 22 (P.C.B. July 21, 1994).

There is no requirement in criterion 8 that an applicant gather or develop all information called for in a solid waste plan before a proposed pollution control facility could be found consistent with the plan. A local siting request need only be consistent with the overall purpose and specific objectives of the solid waste plan. The request may be consistent with the plan even though it does not strictly comply with every directive in the plan to gather or develop information or data. Consistency depends upon being in accord with the principles and objectives of the plan, and not upon completing each and every requirement to provide information.

This is particularly true where, as here, the information requested is not itself relevant to or probative of any of the statutory criteria. Developing traffic characteristics of future growth not only lacks relevance to the statutory criteria, it is inconsistent with criterion 6, which states that impact on existing traffic flows should be minimized. A solid waste plan cannot require

what the Act does not permit. Hence, to require information on future traffic characteristics to satisfy criterion 8 both ignores the standard for plan consistency and contradicts the Act.

(e) The Walter Memorandum Misrepresented the Need to Comply With a Local Ordinance

The Walter Memorandum contended that the Application was defective because WMII failed to meet two requirements identified in the Ordinance, specifically Section 28(a)(4) regarding identification of zoning and land uses five miles from the property boundary, and Section (31)(d) regarding identification of all locations where garbage trucks would enter and exit the county. (Walter Memorandum, p. 4.)

Compliance with a local siting ordinance is not required to satisfy the statutory siting criteria. In fact, the Pollution Control Board lacks authority to compel enforcement of a local ordinance, and may only review such ordinances to determine whether fundamental fairness was violated. Daly, slip op. at 6; Smith v. City of Champaign, No. PCB 92-55, slip op. at 4-5 (August 13, 1992).

The Walter Memorandum's contention that the Application failed to meet the statutory criteria because of a failure to comply with the Ordinance is without any legal basis. In fact, the contention flatly conflicts with the well established principle that the Pollution Control Board cannot enforce the Ordinance, but may only review it to consider fundamental fairness. Daly, slip op. at 6.

B. The Walter Memorandum Inaccurately Summarized The Evidence

As the only County Board member who attended all of the public hearings (Documented attendance by transcripts on 9/17/02, 9/19/02, 9/24/02, 9/26/02, 9/30/02, 10/01/02, 10/03/02, 10/09/02, and 10/10/02.), Mr. Walter was relied upon by other members of the County Board for

a summary of the evidence presented at hearing. However, the Walter Memorandum mischaracterized and misstated the evidence relating to criteria 2, 3, 6 and 8. These mischaracterizations are fundamentally unfair because they were 1) the basis for the Walter Memorandum's conclusion that the Application evidence was flawed and 2) relied upon by the County Board in its decision to deny the Application.

The principal inaccuracies are described below, in the order in which they appear in the Walter Memorandum.

1. **Criterion 6 – Traffic Volume:**

> "Under cross-examination, their traffic expert's testimony confirmed that the traffic volume represented as existing traffic at the time of their application should have been about 160, not the five-year average of 227 as shown. They presented a *five-year average* traffic volume when the volume of landfill related **truck traffic was significantly decreasing**. Their conclusions, including their assertion that traffic would *decrease*, are flawed. (Pp. 28-29, 9/30/02)" (Walter Memorandum, p. 1.)

This is erroneous. Metro Transportation Group, Inc. ("Metro") relied upon actual traffic counts, not historical data, to perform its evaluation and reach its conclusion.

Mr. Miller testified "(t)he volumes that are actually shown in the figures for existing traffic were related to the volumes that we counted on those days last year. The 227 that's referred to there is a historical average that we obtained in connection with representatives from Waste Management just as a perspective. But in terms of showing the existing traffic volumes in our figures, it was related to the counts that we actually made which were at the 160 truck level." (9/30/02 Tr. at 28; 10/01/02 Tr. at 22.) The actual traffic counts are included in the Application in the Appendix of the Metro report, titled "Traffic Count Summary." (Application at Criterion

6, Appendix.) Contrary to the Walter Memorandum, Metro used actual truck and traffic counts collected at the site entrance, which included the lower truck traffic volumes.

The Walter Memorandum ignored Mr. Miller's testimony, the actual traffic counts provided by Metro in the Appendix of the its report, and traffic counts presented in Figures 5, 7 and 8 of its report (summarizing existing traffic counts at street peak hours, Facility traffic at street peak hours, and total traffic expected at street peak hours), *all of which were based on existing traffic conditions, not historic traffic conditions.*

2. **Criterion 6 – Traffic Signal Phasing:**

> "The *traffic expert for the applicant* asserted that the use of Rt. 25 to Bartlett Road would not work for multiple reasons. Among these reasons, the intersection would **require a change in the traffic signal phasing** which **IDOT has informed them would not be granted**. (pp. 32-34, 9/30/02)." (Walter Memorandum, p. 2.)

This is erroneous and does not accurately represent Mr. Miller's testimony. Mr. Miller testified that he personally had discussions with the Illinois Department of Transportation (IDOT) regarding the signal phasing at the Route 25/Dunham Road ("Rt. 25") intersection. IDOT provided two reasons why they would not be undertaking a change of the signal phasing at this time. First, IDOT is anticipating realignment of Stearns Road in the near future, which would provide an improved intersection with revised signal phasing. Second, IDOT was reluctant to change the signal phasing due to the existing intersection geometry and site distance concerns. Mr. Miller testified that in order for IDOT to consider changing the existing signal phasing, a detailed safety study would be required demonstrating that revisions to signal phasing would not cause safety concerns. (9/30/02 Tr. at 32, 33.)

The Walter Memorandum stated that the signal phasing change "would not be granted." This is false. No application was made to IDOT to request a change in signal phasing. Therefore, there is nothing that "would not be granted." All that occurred was a discussion between IDOT and Mr. Miller, discussing IDOT's knowledge of the intersection and its reluctance to make a change at a time when the Stearns Road realignment was already scheduled for construction. (9/30/02 Tr. at 32, 33.)

3. **Criterion 6 – Traffic Signal Warrants:**

> "A traffic signal would ultimately result in *three traffic signals within a half-mile*. Mr. Miller, for the applicant, indicated that warrants "…**would not even be remotely close**" to meeting criteria for a signal. (p. 29-30, 10/01/02) It is entirely **inappropriate** to offer this as a "remedy" to address one of the many deficiencies **based on expert testimony** and our inability to guarantee this condition." (Walter Memorandum, p. 2.)

This is erroneous and misrepresents evidence in the Application and presented at hearing. There is no evidence presented in the Application that WMII recommended or offered to install a traffic signal at the Facility entrance. (Application at Criterion 6.) Further, Mr. Miller testified that the volume of traffic exiting the Facility, in a worst-case scenario, is estimated to be in the range of 40 – 45 vehicles for any one hour. Table 2 of the Metro report estimates a maximum of approximately 54 vehicles for any one hour. (10/01/02 Tr. at 29; Application at Criterion 6, Table 2.) Mr. Miller testified that traffic warrants would require 100 – 150 vehicles per hour before a traffic signal would be considered. (10/01/02 Tr. at 29.)

The Walter Memorandum argued that it "is entirely inappropriate to offer this [traffic signal] as a remedy…" However, *it was Kane County's own expert*, Mr. Brent Coulter, who recommended the addition of a traffic signal at the Facility entrance. (emphasis added) (10/03/02 Tr. at 79-81, 89.) Mr. Coulter opted to use a warrant standard for "normal highways"

which is *less than the current IDOT standard for strategic regional arterials*. (emphasis added) (10/03/02 Tr. at 80.) In the vicinity of the Facility, Rt. 25 is a strategic regional arterial. (Application at Criterion 6, p. 2.) Mr. Coulter opted to use a warrant of 70 vehicles per hour for normal highways, instead of the 150 vehicles per hour warranted for strategic regional arterials.

Even so, Mr. Coulter admitted that "if the site is approved and volumes are monitored, operating conditions are monitored, signals may not be warranted..." (10/03/02 Tr. at 141.)

The Walter Memorandum unfairly misrepresented the testimony of Mr. Miller and evidence in the Metro report. In fact, the Walter Memorandum wrongly attributed the testimony of the County's own witness to Mr. Miller. This blatant error continues the demonstration that the Walter Memorandum included an inaccurate account of the evidence and testimony relevant to this matter, and presented erroneous facts.

4. **Criteria 2 and 8 – Schools:**

> "Criteria 2 required that they *protect the health, safety and welfare of the public*. While agreeing that it would be **important to the "...health and safety and welfare of those students**" to have traffic studies reflecting the routes of these students, their traffic expert admitted **none were considered**. (pp. 41-42, 09/03/02.) *Had they complied* with **Section 28(a)(4) of our Ord. 01-281**, *they would have identified the schools as well as subsurface mining activities to the north already generating large volumes of trucks*." (Walter Memorandum, p. 3.)

Mr. Miller testified that he contacted two school districts to determine when new schools would be opening, was familiar with the location of the schools, had not seen any traffic studies that were prepared for the schools, and did not find traffic studies specific to the schools to be a significant evaluation with regard to protection of the public health and safety for this Facility. (9/30/02 Tr. at 41, 42; 10/01/02 Tr. at 85, 86.) Mr. Miller testified that he considered the schools, and rendered an opinion that they were not significant to his analysis. The Walter

Memorandum misconstrued Mr. Miller's testimony that no studies "were considered," because as he testified, he had not "seen any traffic studies that were prepared for those [schools]..." (9/30/02 Tr. at 41.) The Walter Memorandum was misleading.

Further, Mr. Miller testified that he contacted the St. Charles school district (303), and obtained information on their existing bus routes. Metro also contacted U-46 to obtain its bus routing information. District U-46 indicated that it had over 300 buses and it would take "an incredible amount of time for them to determine where all those bus routes are." Therefore, Metro was unable to get definitive information on the U-46 bus routes. (10/01/02 Tr. at 85, 86.) Mr. Miller testified that "the number of vehicles in proportion to the total number going into the site that would be in the area of the schools I think will be at a very low number. So I'm not sure that in my opinion that there really is any impact." (10/01/02 Tr. at 85.)

Under cross-examination by the Hearing Officer, Mr. Miller testified that it was his understanding based on the discussions with the school districts that "the routing for school buses is either northbound or southbound, that there is (sic) no children that cross 25 to get to a bus." (10/01/02 Tr. at 122.) Based on all of the facilities that he has worked on, Mr. Miller testified that school bus traffic is not a significant factor because they are part of the existing traffic stream, and all vehicles are subject to stopping for buses, including any collection vehicles that might be on the road. (10/01/02 Tr. at 122.)

In addition, Mr. Lannert testified that he was aware of the new schools, but that they were outside the area of evaluation and were approximately 1½-miles from the location of the Facility. (9/17/02 Tr. at 81, 82.)

The Walter Memorandum incorrectly asserted that WMII did not consider the public health, safety and welfare of the students at the two new schools. Two witnesses for WMII

testified to their knowledge of the schools, the location of the schools, discussion with the school districts, and attempts to obtain bus routing information, and concluded that at a distance of 1½ miles, the Facility did not pose any threat to the public health, safety and welfare of the students.

5. Criteria 2 and 3 – Woodland Landfill End Use Plan:

> "...the **end use plan** submitted with that application [1988 siting application] makes it clear that the intended use for this site is *passive recreation*."
>
> "**These conditions were not taken into consideration in Criteria 2**, ... or in that portion of **Criterion 3** that deals with incompatibility with the surrounding area. They propose to use the site drive that was to become the access drive to the park for *hundreds* of trucks weighing up to 80,000 pounds each, traveling in and out of the proposed facility 96 hours per week. This will directly conflict with the planned/promised use as a park." (Walter Memorandum, p. 3, 4.)

This discussion in the Walter Memorandum again misrepresented the evidence. Mr. Lannert testified on multiple occasions that the passive recreational end use, or open space, *will continue as the proposed end use of the Woodland Landfill*. (emphasis added). (9/17/02, Tr. at 93, 99, and 134) Further, he testified that the passive recreational features, such as trails, overviews and overlooks, would still be included in the proposed end use. (9/17/02 Tr. at 102.) Mr. Nickodem testified that an alternate entry location for the open space/passive recreational area would be provided instead of the current entrance area. (9/19/02 Tr. at 146.)

The statement that the site drive was to become the access drive to the park for *hundreds* of 80,000-pound trucks traveling in and out of the proposed facility 96 hours per week is simply wrong. First, as stated above, a different entry location would be provided to the park. (9/19/02 Tr. at 146.) Second, a review of Tables 1 and 2 presented in the Metro report discloses the projected traffic volumes entering the Facility each day: 152 roll-off trucks, weighing

approximately 39,000 lbs each when fully loaded; 142 packer trucks, weighing approximately 56,000 lbs each when fully loaded; and 108 transfer trailers, weighing approximately 73,280 lbs each when fully loaded and leaving, at current roadway weight restrictions. (Application at Criterion 6, p. 10, 11.) None of the trucks entering or leaving the Facility will weigh 80,000 pounds. Only approximately 108 transfer trailers *will leave the Facility* weighing approximately 73,280 pounds. This is not "hundreds" of trucks.

Third, the Walter Memorandum incorrectly stated that this would occur 96 hours per week. The *hours of waste acceptance* for the Facility are 6:00 a.m. to 6:00 p.m., Monday through Saturday, which is 72 hours per week. (Application at Criterion 6, p. 10.) Mr. Hoekstra testified twice that even though a facility may have specified, permitted hours of waste acceptance, in actuality, the operator may choose to have waste acceptance hours that are *shorter than the permitted waste acceptance hours*. (9/26/02 Tr. at 51; 10/3/02 Tr. at 9, 11.) The Walter Memorandum presented erroneous evidence to the County Board.

Finally, the Walter Memorandum stated that the proposed Facility "will directly conflict with the planned/promised use as a park." (Walter Memorandum, p. 4.) The Woodland Landfill property is approximately 213 acres in size. The Facility will be located on a 9-acre parcel, south of the Woodland Landfill, and will take up approximately 4.2 percent of the Woodland Landfill property. (Application at Criterion 2, p. 2-1; Petitioner's Exhibit No. 11.) The Hearing Officer noted in his Findings that "The area on which the transfer station is to be erected is not part of the Woodland Landfill as permitted by the Illinois Environmental Protection Agency. (Findings, p. 9.)

The Facility will utilize only 4.2 percent of the Woodland Landfill property. It has been concluded by Mr. Lannert to be compatible with the surrounding area. (9/17/02 Tr. at 56.) A

separate entrance will be provided to the park, and the end use plan will be developed as indicated in the 1988 Siting Approval. The Walter Memorandum misrepresented all of this evidence in concluding that the Facility "will directly conflict with the planned/promised use as a park."

C. The Walter Memorandum Improperly Considered Information Outside The Record

The Walter Memorandum relied upon information not contained in the record of these proceedings. In this case, the Walter Memorandum presented the following evidence in its argument to persuade the County Board members that WMII had not met its burden of proof.

1. Criterion 6 - Inbound Collector Trucks:

> "South Elgin, Wayne and St. Charles will quickly become accustomed to *no more garbage* trucks." "**Inbound collector trucks will prevent reduction of the traffic burden, which was to occur with the closure.**" (Walter Memorandum, p. 1.)

During the hearing, no evidence was presented, nor did any expert testify as to the state of the public in South Elgin, Wayne and St. Charles. In fact, the statement is illogical because even if the Facility were not developed, residents of these communities will continue to generate waste that will require collection and disposal. Garbage trucks will remain a part of the traffic volume in these communities so long as waste is generated.

2. Criterion 6 - Over-Burdened Bridges:

> "24 of 29 townships are entirely or partially west of the river, **requiring hundreds of truck per day to cross our already over-burdened bridges**. This site fails to reasonably minimize impact on existing traffic as required in **Criteria 6**." (Walter Memorandum, p. 3.)

At no time during these proceedings was any testimony provided, nor opinions rendered, regarding the volume of trucks crossing bridges within the service area and the burden on such bridges. The traffic routing proposed by WMII does not require transfer trailers to cross the river, nor does the traffic routing proposed by the County's expert require transfer trailers to cross the river. The service area reflects the communities that WMII is currently servicing and that it intends to service in the future. (10/03/02 Tr. at 49.) Collection trucks will continue to collect waste along customer routes within the defined service area as they have done in the past.

3. **Criterion 6 - Rail Lines:**

> "The applicant admitted that they **gave no consideration to the use of a rail line** located near the property that could have eliminated the need for hundreds of transfer trailer trips each day." (Walter Memorandum, p. 3.)

Mr. Miller testified that he was "not aware of any proposed use of the railroads to handle any garbage..." (9/30/02 Tr. at 42.) The Walter Memorandum insinuated from Mr. Miller's testimony that the use of a rail line "could have eliminated the need for hundreds of transfer trailer trips each day." There were no opinions or conclusions rendered by any witness (including the County's witness), nor any evidence presented, that the use of a rail line would eliminate the need for the transfer trailers. This statement is an opinion presented in the Walter Memorandum supported by no evidence. It falsely suggested to other County Board members that there was.

4. **Criteria 2 and 3 - Comprehensive Plan of South Elgin:**

> "The Comprehensive Plan of South Elgin relied upon **promises made** by Waste Management and **conditions imposed by this Board** in 1988. This Plan was ignored as it applies to **Criteria 2 and Criteria 3**." (Walter Memorandum, p. 3.)

There is no evidence or testimony in the record establishing that the Comprehensive Plan relied upon a promise or condition that a transfer station could not be constructed on any part of the Woodland Landfill property. There is no evidence or testimony in the record supporting the claim that the statements made by WMII or the conditions imposed by the County Board in the 1988 Siting Approval meant that no transfer station could ever be built on any part of the Woodland Landfill property.

Moreover, the Comprehensive Plan was not ignored as it applied to criteria 2 and 3. (9/17/02 Tr. at 87-102.) Mr. Lannert specifically considered the Comprehensive Plan and found the Facility to be consistent with it. (9/17/02 Tr. at 87-89.)

Finally, the 1988 Siting Approval is not properly considered in these proceedings. For the County Board to render a decision based upon the meaning of a previous siting approval condition is to rely upon information neither presented in this record, nor deemed inappropriate for consideration by the Hearing Officer. (9/19/02 Tr. at 15.)

5. Criteria 2 and 3 - Request for Relief:

> "*We are being asked to relieve Waste Management of the obligations already agreed to and imposed upon them by this Board.*" (Walter Memorandum, p. 4.)

At no time during these proceedings did Waste Management ever request to be relieved of any obligation imposed upon them by the County Board.

In summary, the Walter Memorandum was a legal argument intended to persuade the County Board to deny the Application. In its zeal to convince the County Board, the Walter Memorandum misstated the applicable law, misrepresented testimony, presented erroneous evidence and argued matters not presented in the siting record. WMII had no opportunity to

respond to or correct the inaccuracies and errors in the document relied on by the County Board in reaching its decision. The County Board's knowledge of and reliance on the erroneous and misleading Walter Memorandum was fundamentally unfair not only because WMII had no opportunity to respond to it, but also because the County Board decision was based upon incorrect legal standards, matters outside the record, and erroneous facts.

D. The County Board's Failure To Find That Criteria 2, 3, 6 And 8 Were Met Is Against The Manifest Weight Of The Evidence

The County Board failed to find that WMII met the statutory requirements of criteria 2, 3, 6 and 8. (Resolution No. 02-431.) It did so on the basis of the Walter Memorandum. However, the Walter Memorandum, as demonstrated above, misapplied the law and misstated the evidence. As a result, the County Board's failure to find that criteria 2, 3, 6 and 8 were met is against the manifest weight of the evidence.

The Hearing Officer found that all of the criteria were met, and proposed conditions to remedy any concerns. (Findings, pp. 11-27.) The County Board Chairman accepted all of those findings and conditions. (Resolution No. 02-431.) Notwithstanding this acceptance, the County Board rejected the Hearing Officer's findings in favor of the Walter Memorandum. The statements in the Walter Memorandum relating to criteria 2, 3, 6 and 8 are against the manifest eight of the evidence.

1. Criterion 2

> Criterion 2: "the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected" 415 ILCS 5/39.2(a)(ii)

The second criterion to be established is that the Facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected. This criterion requires a demonstration that the proposed facility does not pose an unacceptable risk to the public health and safety. Industrial Fuels & Resources v. Pollution Control Board, 227 Ill. App. 3d 533, 592 N.E.2d 148, 157 (1st Dist. 1992). It does not, however, require a guarantee against any risk or problem. Residents Against Polluted Environment v. Pollution Control Board, 293 Ill. App. 3d. 219, 687 N.E.2d 552 (3rd Dist. 1997); File v. D&L Landfill, 219 Ill. App. 3d 897, 579 N.E.2d 1228 (5th Dist. 1991).

No qualified witnesses were presented or offered evidence to demonstrate that the design of the Facility is flawed from a public safety standpoint or that its proposed operation poses an unacceptable risk to public health or safety. The Walter Memorandum did not establish how particular design or operating features of the transfer station might increase risk of harm to the public, or that the Application ignored or violated any applicable government regulations. Where, as in these proceedings, no such showings were made, the prima facie case stands unrebutted and criterion 2 has been satisfied. Industrial Fuels, 592 N.E.2d at 157.

It was inappropriate for the County Board members to rely on the Walter Memorandum particularly when, here in these proceedings, the Hearing Officer found that not only was criterion 2 met, but that WMII's witnesses were credible witnesses. With regard to Mr. Nickodem (WMII's engineering witness), the Hearing Officer found him "to be a knowledgeable, credible witness." (Findings, p. 14.) With regard to Mr. Hoekstra (WMII's operations witness), the Hearing Officer found "his testimony to be helpful and believable." (Findings, p. 16.)

The Walter Memorandum identified three reasons as to why criterion 2 was not met: 1) WMII did not identify the two new schools in the area and that students would not be protected from the Facility because WMII did not consider a traffic study reflecting the routes of the transportation of students, 2) the incorporation of the end use plan as identified in the 1988 Siting Approval such that it is altered by the addition of the Facility, and 3) the travel of trucks moving in and out of the Facility entrance, previously identified as the entrance to the proposed end use. (Walter Memorandum, pp. 3, 4.) The evidence in this record does not support the findings of the Walter Memorandum, nor that the public health, safety and welfare will be jeopardized.

The Walter Memorandum incorrectly asserted that WMII did not consider the public health, safety and welfare of the students at the two new schools. Two witnesses for WMII testified to their knowledge of the schools, the location of the schools, discussion with the school district, attempts to obtain bus routing information, and concluded that at a distance of 1½ -miles from the Facility did not cause a detriment to the public health, safety and welfare of the students. (See supra pp. 17-19.)

The Walter Memorandum concluded that the closed Woodland Landfill could not be developed as planned due to the development of the Facility, that the Facility "will directly conflict with the planned/promised use as a park," and as such, is not protective of the public health, safety and welfare. (Walter Memorandum, p.4.) The evidence contradicts these conclusions.

The Facility will be an approximately 9-acre parcel, located in the southeast corner of the Woodland Landfill property. (Application at Criterion 2, p. 2-1.) The Woodland Landfill property is approximately 213 acres in size. The Facility will take up approximately 4.2 percent of the Woodland Landfill property. (Petitioner's Exhibit No. 11.) The Hearing Officer noted in

the Findings that "The area on which the transfer station is to be erected is not part of the Woodland Landfill as permitted by the Illinois Environmental Protection Agency. (Findings, p. 9.) The Facility will be separate and distinct from the closed landfill.

There is no evidence in this record that WMII will not develop the closed Woodland Landfill as a passive recreational area. Mr. Lannert testified on multiple occasions that the passive recreational end use, or open space, *will continue as the proposed end use of the Woodland Landfill*. (9/17/02, Tr. at 93, 99, 134) Further, he testified that the passive recreational features, such as trails, overviews and overlooks, would still be included in the proposed end use. (9/17/02 Tr. at 102.) Again, Mr. Lannert testified that "all of the Woodland Landfill property, that portion that the footprint of the landfill sits on as well as the other residual areas are open space now and that will ultimately be the use in that area." (9/17/02 Tr. at 99, 134.) Further, Mr. Nickodem testified that an alternate entry location for the open space/passive recreational area would be provided instead of the current entrance area, which will be used for the Facility. (9/19/02 Tr. at 146.) WMII accounted for the protection of public safety by proposing to relocate the entrance to the closed landfill.

The conclusions presented in the Walter Memorandum that criterion 2 was not met are unfounded. By relying on the inaccurate summary of evidence related to criterion 2 as presented in the Walter Memorandum, the County Board erred in concluding that criterion 2 had not been met. The record contains substantial testimony and persuasive evidence that the Facility has been designed, located and proposed to be operated to protect the public health, safety and welfare.

2. Criterion 3

Criterion 3: "the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property" 415 ILCS 5/39.2(a)(iii)

The third criterion provides that the Facility be located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of surrounding property. This criterion requires that the applicant demonstrate that it has done or will do what is reasonably feasible to minimize incompatibility or effect on surrounding property values. File v. D&L Landfill, 219 Ill. App. 3d 897, 579 N.E. 2d 1228 (5th Dist. 1991). It does not require that the applicant choose the best possible location to guarantee that no fluctuation in property value occurs. Sierra Club v. Will County Board, No. PCB 99-136, slip op. at 27 (P.C.B. August 5, 1999), citing Clutts v. Beasley, 185 Ill. App. 2d 543, 541 N.E. 2d 844, 846 (5th Dist. 1989).

WMII presented two witnesses who testified regarding criterion 3. Mr. Chris Lannert testified on the character of the surrounding area and minimizing incompatibility of the Facility with the surrounding area. Ms. Patricia McGarr testified on the minimization of any impact to property values surrounding the Facility.

No other witnesses testified in these proceedings regarding criterion 3. Again, the Hearing Officer found the testimony of both Mr. Lannert and Ms. McGarr to be probative of Criterion 3 and found that WMII had met criterion 3. (Findings, p. 18.)

The Walter Memorandum argued that WMII did not prove that the Facility would minimize incompatibility with the character of the surrounding area. It identified three areas where WMII failed to meet criterion 3. The Walter Memorandum claimed that WMII "ignored" the Comprehensive Plan of South Elgin which "relied upon promises made by Waste

Management and **conditions imposed by this Board** in 1988," and as well, that the Kane County 2020 Plan also relied upon the 1988 siting application end use plan. (Walter Memorandum, pp. 3, 4.) It next claims that criterion 3 was not met because the use of the Facility drive that was to become an access drive to the closed Woodland Landfill passive recreational area "will directly conflict with the planned/promised use as a park," and suggests that if the Facility is approved, "the planned use of this property and the surrounding area will be forcibly altered." (Walter Memorandum, p. 4.) Lastly, the Walter Memorandum argued that WMII failed properly to evaluate the character of the surrounding area and potential property value impacts because it only evaluated a 1-mile radius around the Facility instead of a 5-mile radius. (Walter Memorandum, p. 4.)

Mr. Lannert testified that the Facility is compatible with the character of the surrounding area because of the existing industrial and business uses adjacent to the site, either zoned industrial or B-3, that the agricultural and open space uses are predominant in the study area, and that screenings and buffers will enhance compatibility. (9/17/02 Tr. at 56, 57.) More specifically, Mr. Lannert testified that the Facility is surrounded by existing industrial uses, including a concrete pipe plant to the south, the closed Tri-County Landfill, the closed Elgin Landfill, the railroad tracks embankment, and an asphalt paving and contractor's yard. (9/17/02 Tr. at 59, 73, 101, 102.) In fact, he testified that "if there ever was a great location for a transfer station, it would be in this corner [of the Woodland Landfill property]." (9/17/02 Tr. at 101.) Mr. Lannert stated that the 9-acre parcel for the Facility is "very appropriate in the context of this portion of this land" and that it is "a very similar, if not upgradeable use in this location." (9/17/02 Tr. at 102.)

Mr. Lannert testified, and his report demonstrates, that he evaluated the Kane County 20/20 Plan and the South Elgin Comprehensive Plan. (9/17/02 Tr. at 59; Application at Criterion 3, Lannert Report, p. 12.) The Facility is consistent with those plans and the open space designations for the Woodland Landfill area, because of the mixture of uses in the surrounding area, including "industrial uses, the concrete pipe plant to the south, those uses on the corner, have been there historically...for a long time. And I think that the open space uses with the Prairie Path and with the reclaimed end use of the landfill...is the reason that it is compatible." (9/17/02 Tr. at 59.) Mr. Lannert described the buffering of the Facility from surrounding land uses, including the adjacent Prairie Path. The Prairie Path will be buffered from the Facility by a 20-foot high wooden screening wall, mounted atop an 8-foot retaining wall, and will be situated adjacent to existing vegetation. (9/17/02 Tr. at 55, 56.)

Extensive questioning by the Attorney for the Village of South Elgin attempted to portray Mr. Lannert as not having accounted for the open space plans in the area. Mr. Lannert testified that his evaluation in the immediate vicinity of the Facility (within a 1-mile radius) indicated that 46% of the area is either agricultural, open space or farmland; 26% of the area is residential, and the remaining 28% is either industrial or other use. (9/17/02 Tr. at 50, 51; Application at Criterion 3, Lannert Report, p. 9.) The "immediate neighbors are either industrial or business uses, and only further removed to the south and further removed to the north and west" are the residential uses. (9/17/02 Tr. at 109.) He testified that the plans talk about "a focus of predominantly open space uses in the area and we are consistent with that..." (9/17/02 Tr. at 92.) Mr. Lannert on several occasions testified that the Facility is a 9-acre parcel, located southeast of the Woodland Landfill, and that "all of the Woodland Landfill property, that portion that the footprint of the landfill sits on as well as the other residual areas are open space now and

that will ultimately be the use in that area." (9/17/02 Tr. at 99.) Contrary to the claims in the Walter Memorandum and by other objectors, Mr. Lannert did not ignore the Kane County 20/20 Plan, the South Elgin Comprehensive Plan, or the County open space goals of the 20/20 Plan.

Despite a ruling from the Hearing Officer that the County Board's 1988 Siting Approval is not relevant, the Walter Memorandum argued that the 1988 Siting Approval had to be considered in order for WMII to meet criterion 3 because WMII ignored conditions imposed previously by the County Board in its evaluation. (9/19/02 Tr. at 15; Walter Memorandum, pp. 3, 4.) Notwithstanding the irrelevance of the 1988 Siting Approval to whether criterion 3 was met, the evidence presented by WMII refutes this contention. Mr. Lannert repeatedly testified that the passive recreational end use, or open space, *will continue as the proposed end use of the Woodland Landfill.* (emphasis added) (9/17/02 Tr. at 93, 99 and 134.) Further, he testified that the passive recreational features, such as trails, overviews and overlooks, would still be included in the proposed end use. (9/17/02 Tr. at 102.) The Hearing Officer concluded in his Findings that "the area on which the transfer station is to be created is not part of the Woodland Landfill as permitted by the Illinois Environmental Protection Agency." (Findings, p. 9.) With regard to the entrance to the proposed end use for the closed landfill, Mr. Nickodem testified that an alternate entry location for the open space/passive recreational area would be provided instead of the existing entrance area, which would be used for the Facility. (9/19/02 Tr. at 146.)

There were no witnesses presented in opposition to criterion 3. No evidence was presented which substantiated the claims made in the Walter Memorandum that if the Facility were approved, "the planned use of this property and the surrounding area will be forcibly altered." (Walter Memorandum, p. 4.) There is no evidence that indicates that the operation of the Facility "will directly conflict with the planned/promised use as a park." (Walter

Memorandum, p. 4.) All of Mr. Lannert's testimony and opinions demonstrate an extensive evaluation of surrounding properties, land uses, and knowledge of local community plans. His testimony concludes that the Facility is compatible with the surrounding area. The claims in the Walter Memorandum are contrary to the unrefuted testimony of Mr. Lannert.

The Walter Memorandum also argued that criterion 3 was not met because WMII did not evaluate a 5-mile radius from the Facility as required by the Ordinance. Mr. Lannert evaluated the surrounding area within a 1-mile radius from the Facility. (Application at Criterion 3, Lannert Report, p. 6.) All of the land uses and zoning designations were identified, described, graphically presented and included in the Application. (Application at Criterion 3, Lannert Report, p. 2, 6-9, and Exhibit 1.) Additionally, a review of Exhibit 1 of the Lannert report demonstrates that zoning classifications were provided outside the 1-mile radius. In fact, for the Village of South Elgin, it included zoning information up to approximately 2 miles from the Facility, including many areas west of the Fox River. (Application at Criterion 3, Lannert Report, Exhibit 1.) As stated above, the Hearing Officer stated in his Findings that "The County's Ordinance indicates the applicant is to conduct a study within a five (5) mile radius of the site. State statute is silent on any area where the study must be conducted. I have carefully reviewed Mr. Lannert's reports, studies and testimony, and I find them to be in substantial compliance with the Ordinance." (Findings, pp. 17, 18.) Moreover, criterion 3 states that incompatibility is to be minimized for the "surrounding area." "Surrounding," means "that which encircles on all or nearly all sides." (Webster's New World Dictionary, 3rd 1991.) There is no basis to conclude that the "surrounding area" is more than a mile removed from the Facility. The Act clearly does not state that an evaluation must include an area five miles out

from the property line. It simply states that the applicant must locate the facility to minimize incompatibility with the character of the surrounding area.

The Walter Memorandum presented no support for its arguments claiming that criterion 3 was not met. Other than Mr. Lannert, no other witness testified regarding this portion of criterion 3, relating to minimizing incompatibility with the character of the surrounding area. There was no impeaching evidence presented that the Facility is incompatible, or that WMII has not done or will not do what is reasonably feasible to minimize any incompatibility. There is ample evidence in the record to establish that WMII has met criterion 3.

3. Criterion 6

> Criterion 6: "the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows: 415 ILCS 5/39.2 (a)(vi)

The sixth criterion to be established is whether traffic patterns to or from the Facility will minimize impact on existing traffic flows. The issue is not whether there is any acceptable route or no negative impact, but whether any impact on traffic flow has been minimized. Fairview Area Citizens Task Force v. Illinois Pollution Control Board, 198 Ill. App. 3d 541, 555 N.E.2d 1178, 1187 (3rd Dist. 1990). A traffic plan is not required; questions regarding traffic noise, dust and driver negligence are not relevant. Id. The key principal is to minimize impact on traffic as it is impossible to eliminate all problems. Id.

Mr. Miller testified regarding criterion 6. His analysis, and the subsequent basis for his opinion, consisted of field visits of the site and surrounding area, a personal transfer trailer ride on the identified traffic route, observation of traffic operations, evaluation of surrounding roadway characteristics, daily and peak hour traffic counts, projection of traffic (trip) generation from the Facility, evaluation of traffic assignments (directional distribution), a capacity analysis,

a gap study analysis, a site distance analysis, and a review of on-site stacking of trucks within the Facility. Field visits were conducted of the site and the surrounding area to observe traffic operations and to collect information on the surrounding roadway characteristics and traffic controls. (9/30/02 Tr. at 10, 11.) His analysis and evaluation of the impact of the Facility on existing traffic was extensive.

The Walter Memorandum's argument that criterion 6 was not met was based on a mischaracterization of the testimony of Mr. Miller. Further, the argument did not accurately account for the testimony of the County's own expert, Mr. Brent Coulter.

The conclusion of the Walter Memorandum was that "*all existing routes have been shown to be inadequate by expert testimony*." (Walter Memorandum, p. 2.) The only two experts who rendered an opinion during these proceedings regarding impact of the Facility on existing traffic flows were Mr. Miller and the County's witness, Mr. Coulter. Both experts testified to a variety of traffic routes, and both testified that suitable routes existed. The conclusion in the Walter Memorandum to the contrary is unfounded.

Mr. Miller recommended a route for transfer trailers associated with the Facility that would require trucks to exit the Facility and travel south on Rt. 25 to Illinois Route 64, and then turn left and travel east to Illinois Route 59 ("South Route"). (9/30/02 Tr. at 22-23.) Mr. Miller recommended this route because it "presented the least impact on existing traffic flows." (9/30/02 Tr. at 44.) The basis for his opinion is that this route utilizes all state maintained routes, it eliminates the need for transfer trailers to turn left from the Facility and travel through the Rt. 25/Dunham Road intersection, Rt. 25 in the vicinity of the Facility operates at only 53% of its capacity, and Facility peak traffic hours do not coincide with street peak traffic hours on Rt. 25. (9/30/02 Tr. at 16, 23, and 33 - 34.) With the addition of Facility traffic, Rt. 25 would then

operate at approximately 56% of its capacity. (9/30/02 Tr. at 24.) While this was the route Mr. Miller recommended as it presented the least impact on existing traffic flows, it was not the only route he evaluated.

Mr. Miller also evaluated two other alternate routes, including one that would have transfer trailers proceed north from the Facility on Rt. 25, through the Rt. 25/Dunham Road intersection, and then proceed south either on Dunham Road or turn east onto Stearns Road. Constraints with the connector road regarding stop conditions and road width/geometry, as well as constraints at Stearns Road with no turn lanes, ruled out these alternate routes in the short term. (9/30/02 Tr. at 36-38; 10/01/02 Tr. at 97, 98.)

The other alternate route evaluated by Mr. Miller included one that would have transfer trailers proceed north from the Facility on Rt. 25, through the Rt. 25/Dunham Road intersection, proceed north to the intersection of Rt. 25 and West Bartlett Road, and then proceed east on West Bartlett Road. Traffic counts were performed and capacity was evaluated at the intersection of Rt. 25 and West Bartlett Road. The intersection of Rt. 25 and West Bartlett Road operates at a level of service C. (10/01/02 Tr. at 15.)

Mr. Miller testified that it is possible to route transfer trailers along this route. However, as he explained, "one of the criteria that we were trying to minimize was that we would be taking these transfer trailers through the intersection of 25 and Dunham." (10/01/02 Tr. at 101.) In addition, he testified that loaded "transfer trailers would be turning left from the site versus going right to go south on 25." (10/01/02 Tr. at 104.) Even though there were adequate gaps to accommodate the turns, it is an easier maneuver to make a right turn. (10/01/02 Tr. at 104.)

Mr. Miller testified that he expected that the additional traffic added to the Rt. 25/West Bartlett Road intersection would still result in a level of service C at that intersection. (10/01/02 Tr. at 16.)

A level of service analysis was performed at the intersection of Rt. 25 and Dunham Road. It operates at a level of service F in the morning and afternoon street peak hours. (9/30/02 Tr. at 16; 10/01/02 Tr. at 15.) However, Mr. Miller testified that the existing Rt. 25/Dunham Road intersection could operate so as to not impact the current level of service F at that intersection, because "the volume of traffic coming to the site in early years will actually be the same or less than what is occurring to the landfill right now." (10/01/02 Tr. at 83) Mr. Coulter concurred that such a condition could exist. (10/09/02 Tr. at 98.)

Mr. Miller concurred that the West Bartlett Road alternative was a straighter, and "a little bit shorter" route. (10/01/02 Tr. at 118.) At no time did Mr. Miller testify that this route did not minimize impact on existing traffic. He simply preferred the south route because it presented the least impact on existing traffic flows. (9/30/02 Tr. at 44.)

The County presented Mr. Brent Coulter as an expert witness who evaluated the Metro report. Mr. Coulter did not testify in opposition to the Application. (10/09/02 Tr. at 24.) Mr. Coulter testified that the south route "is not suitable as a route of waste transfer vehicles," and in his opinion, "would not minimize impact on existing traffic flows." (10/09/02 Tr. at 35.) He testified that the south route did not minimize impact due to the general alignment of Rt. 25, residential street functions, and the turning radius at the Rt. 25/Rt. 64 intersection. (10/09/02 Tr. at 36, 82.)

Consistent with the testimony of Mr. Miller, Mr. Coulter testified that the routing of transfer trailers to the Rt. 25/Dunham Road intersection, and then south along Dunham Road or

turning east onto Stearns Road, would not minimize impact to existing traffic flows. (10/09/02 Tr. at 52, 56.)

Mr. Coulter testified that the routing of transfer trailers north on Rt. 25, through the Rt. 25/Dunham Road intersection, north to West Bartlett Road, and then east on West Bartlett Road ("North Route") was a suitable route, and had characteristics that made this a "candidate for consideration as a routing for waste transfer vehicles." (10/09/02 Tr. at 58, 103.) He highlighted characteristics which included the existing high volumes of heavy commercial trucks on this route (in the vicinity of 10-15 percent heavy trucks), surrounding land uses that are a mixture of industrial, commercial and residential, and road alignments are generally straight and flat. (10/09/02 Tr. at 58, 59.) Consistent with Mr. Miller, Mr. Coulter also testified that there was one limiting factor concerning the north route, and that was routing transfer trailers through the Rt. 25/Dunham Road intersection and its existing level of service. (10/09/02 Tr. at 62.)

Mr. Coulter testified that by limiting the volume of the Facility to 1,000 tpd, that the Facility "impact in terms of truck generation on the Route 25-Dunham intersection would minimize the impact on existing traffic flow." (10/09/02 Tr. at 96, 97.) Based on his evaluation of 1,000 tpd, Mr. Coulter testified that the "net effect as we look at impact on the intersection in terms of level of service is that the level of service at Dunham and Route 25 at the existing temporary traffic signal can remain essentially at existing levels." (10/09/02 Tr. at 97, 98.)

He testified that the north route "is suitable for waste transfer truck routing," and "that there are characteristics of Route 25 to the north of the site and West Bartlett Road which may make it suitable for routing waste transfer vehicles." (10/09/02 Tr. at 135.)

The Hearing Officer noted in his Findings that he did not find the south route to be suitable. (Findings, p. 23.) However, he noted that Mr. Coulter's proposed alternative, the north route, agreed with Mr. Miller's testimony. (Findings, p. 24.)

The evidence presented on criterion 6 established that there were two routes that could accommodate Facility traffic and minimize impact on existing traffic flows. The first was the south route preferred by Mr. Miller, and the second was the north route preferred by Mr. Coulter. While Mr. Coulter did not agree that the south route minimized impact, Mr. Miller agreed that the north route was suitable, although preferring the south route.

There was no evidence to support the Walter Memorandum conclusion that all existing routes were shown to be inadequate by expert testimony. To the contrary, the two experts who testified and rendered opinions on criterion 6 each identified a suitable route. While they disagreed on the south route, they both agreed that the north route was suitable. The conclusion in the Walter Memorandum lacked any support in the record and is, in fact, squarely contradicted by the manifest weight of the expert testimony.

4. Criterion 8

> Criterion 8: "if the facility is to be located in a county where the county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan" 415 ILCS 5/39.2 (a)(viii)

The eighth criterion requires a determination whether the Facility is consistent with the solid waste plan of the county in which it is located. This criterion involves review of the plan language to determine whether the proposed facility is consistent with the plan. Land and Lakes Company v. Randolph County, No. PCB 99-59, slip op. at 31-32 (P.C.B. September 21, 2000).

Strict compliance with the plan is not required. City of Geneva v. Waste Management of Illinois, Inc., No. PCB 94-58, slip op. at 22 (P.C.B. July 21, 1994).

Ms. Sheryl Smith was the only witness who testified in these proceedings regarding criterion 8. No other witnesses presented testimony or offered evidence to rebut Ms. Smith's testimony.

The Walter Memorandum argued that criterion 8 was not met because WMII did not address one item identified in Figure 6.2 of the Kane County Solid Waste Management Plan (the "Plan") as being required for a transfer station application, and therefore the Application was not consistent with the Plan. Strict compliance with a solid waste plan is not required. The applicant is required to demonstrate consistency with the planning requirements of the county plan. The evidence in this record demonstrates that WMII substantially complied with the requirements of the Plan and is consistent with the planning requirements identified in the Plan.

Ms. Smith testified that she reviewed that portion of the Application which contained written responses to all of the requirements identified in Figure 6.2 of the Plan. (10/03/02 Tr. at 60.) She testified that she relied on the information provided by the various consultants which addressed each of their individual reports and believe that they provided information to answer the sections of Figure 6.2 that related to their specific criterion. (10/03/02 Tr. at 60.) She testified that her opinion was based on an overall review of all the elements of the Plan, in addition to Figure 6.2, including "the methods that the County intends to manage their waste long-term, the fact that they intend to rely on transfer stations, the fact that there's not sufficient transfer capacity or disposal capacity in the county, and these elements taken together are all factors that are looked at when I make a determination as to whether or not …this application is consistent." (10/03/02 Tr. at 61, 62.) Ms. Smith testified that it was her opinion that the

Application was not inconsistent with the Plan if some of the requirements in Figure 6.2 were not included. (10/03/02 Tr. at 63.)

The Walter Memorandum argued that WMII did not develop traffic characteristics of future growth. (Walter Memorandum, p. 3.) As stated above (See supra, pp. 12-13), such information is neither necessary to satisfy criterion 8, nor relevant to the statutory criteria.

Failure to provide information that is either not required by the statutory language, or arbitrary, does not cause a siting application to be inconsistent with the plan. A county plan may not require, as a condition of finding plan consistency, information that is irrelevant to the statutory criteria. Information regarding future traffic growth is irrelevant to an evaluation of whether criteria 6 or 8 have been met. Thus, a negative finding on criterion 8 cannot be based on the failure to provide information that is irrelevant to the statutory criteria.

5. Local Ordinance

In yet another attempt to establish support for its argument that the Application did not meet the statutory criteria, the Walter Memorandum alleged that WMII failed to meet two requirements identified in the Ordinance, specifically Section 28(a)(4) regarding identification of zoning and land uses five miles from the property boundary, and Section (31)(d) regarding identification of all locations where garbage trucks would enter and exit the county. (Walter Memorandum, p. 4.)

As described above (See supra p. 13), compliance with a local siting ordinance is not required to satisfy the statutory criteria. Even if it were, these requirements of the Ordinance are arbitrary and bear no reasonable relationship to any of the statutory criteria.

The requirement that WMII provide a description of land uses and zoning within a five-mile radius of the Facility is unreasonable and not related to the evaluation of criterion 3. The

"surrounding area" is the area that encircles and borders on all sides of the subject site. It does not include an area two to five miles away. Providing land use and zoning information for a 78.5 square mile area is unnecessary to evaluate any impact to the area "surrounding" the subject site. Indeed, the Hearing Officer found Mr. Lannert's reports and testimony "to be in substantial compliance with the Ordinance." (Findings, pp. 17, 18.)

The requirement that WMII identify all locations where garbage trucks would enter and exit the county is equally arbitrary. The Hearing Officer found "this objection to be somewhat artificial. There is no way the applicant can know every road into the County that a waste vehicle will travel. The applicant has presented an adequate, not perfect, study of this criterion and has substantially complied with the siting ordinance." (Findings, p. 24.)

III. CONCLUSION

The County Board decision denying the Application was based on the legally and factually inaccurate Walter Memorandum, to which WMII had no opportunity to respond. Hence, the procedure by which the County Board reached its decision was fundamentally unfair, and the result was a legislative, not an adjudicative, decision.

The County Board's legislative decision rejected the findings of the Hearing Officer to the extent they were inconsistent with the Walter Memorandum. Consequently, the County Board did not find that criteria 2, 3, 6 and 8 were met. However, the manifest weight of the evidence presented in the record established that criteria 2, 3, 6 and 8 were satisfied.

For these reasons, the Kane County Board decision denying site location approval should be reversed.

Respectfully submitted,

WASTE MANAGEMENT OF ILLINOIS, INC.

By _____
One of its Attorneys

Donald J. Moran
PEDERSEN & HOUPT
161 North Clark Street, Suite 3100
Chicago, Illinois 60601
Telephone: 312/641-6888